

AO 93-003



**NORTH CAROLINA BOARD OF ETHICS**

116 WEST JONES STREET  
RALEIGH 27603-8003  
(919) 733-5103

GEORGE F. BASON  
CHAIRMAN

September 10, 1993

Mr. John F. McNair III Post Office Box  
3099 Winston Salem, North Carolina  
27150

Regarding: North Carolina Railroad Board of Directors

Dear Mr. McNair:

We have considered your letters of July 16 and 26, 1993, requesting exemption from the reports required by Executive Order Number One for gubernatorial appointees to the North Carolina Railroad Board of Directors.

It is the opinion of the North Carolina Board of Ethics that **the gubernatorial appointees to the North Carolina Railroad Board of Directors are covered by Governor Hunt's Executive Order Number One.**

Covered appointees are required to file a statement of economic interest annually as provided by the Board of Ethics.

The Board of Ethics is required to evaluate the statements of economic interest for actual and potential conflicts of interest, and to make the statements available for public inspection. (Usually, the press is the "public.")

We recognize that this process may entail some inconvenience to you. However, the Governor has determined that open and ethical conduct by his appointees is a high priority for his administration.

Accordingly, we encourage you to file your statement of economic interest by October 11, 1993.

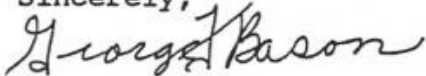
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Mr. John F. McNair III  
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September 10, 1993

Please call our office if you have questions concerning  
the statement of economic interest.

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "George F. Bason". The signature is written in dark ink and is positioned below the word "Sincerely,".

George F. Bason  
Chairman

cc: Appointees to the NC Railroad Board  
Members, Board of Ethics  
Mr. Brad Wilson, Governor's Legal Counsel  
Ms. Jan Parker, Director, Boards and  
Commissions, Governor's Office

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GEORGE F. BASON  
CHAIRMAN

July 28, 1993

Mr. John F. McNair III  
Post Office Box 3099  
Winston-Salem, North Carolina 27150

Dear Mr. McNair:

Thank you for your letter dated July 26, 1993, regarding the appropriateness of the members of the Board of Directors of the North Carolina Railroad Company filing a Statement of Economic Interest with the North Carolina Board of Ethics.

I will send your letter to the Board. As mentioned in my earlier letter, the Board will consider and respond to this question.

In the meantime, I have the following thoughts to share with you and the Board of Ethics.

The North Carolina Railroad Company is a corporation chartered by the General Assembly.

North Carolina is the majority stockholder. From reading the charter, it appears that the public's funds were used to purchase the stock. It appears that the State of North Carolina can, by agreement, transfer shares of its stock to the gubernatorial appointees so that they can qualify to be a director of the corporation.

The Articles of Amendment to the Charter of the North Carolina Railroad Company, Section 2(B) indicate that the purposes for which the Corporation was formed be enlarged to include the buying and selling or otherwise dealing in real or personal property and engaging in any other lawful activity for which a corporation may be formed under the Business Corporation Act of North Carolina. It would seem that the public's money would be used to accomplish this since the State is the majority stockholder.

Mr. John F. McNair III

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July 28, 1993

The North Carolina Railroad Company charter indicates that the affairs of the corporation shall be managed and directed by a Board of Directors to consist of fifteen directors, ten on the part of the State, and five on the part of the private stockholders.

The articles of merger of the Atlantic and North Carolina Railroad Company into North Carolina Railroad Company, Exhibit B (By-law Amendment) indicate that the directors are elected at the annual meeting of shareholders as follows: ten directors are elected by the shares held by the State of North Carolina and five directors are elected by the shares held by shareholders other than the State of North Carolina. The directors elected by the shares held by the State of North Carolina shall be named in a proxy executed and given by the Governor to his designee who attends the annual meeting of shareholders. Shareholders other than the State of North Carolina are not entitled to vote in the election of the directors elected by the shares held by the State of North Carolina. The election process appears to be a mere formality. It is my understanding that in the elections the Governor's appointees usually prevail.

The North Carolina Railroad Company charter indicates that the Governor has the power to remove any director he appoints for causes he may deem sufficient and has the power to fill the vacancy.

Sections 3(g) and 6(a)(1) of Executive Order Number One (Order) clearly express the Governor's intent that his appointees are subject to the Order and required to file statements of economic interest with the Board of Ethics.

Most boards and commissions are subject to laws, regulations, etc., other than Executive Order Number One. Executive Order Number One and the Board of Ethics do not use this as justification for not covering them under the Ethics Order.

Three of the new appointees to the North Carolina Railroad Company board have already filed the statement of economic interest. Since 1977, the directors have filed the statements of economic interest. The gubernatorial appointees serving on the Atlantic and North Carolina Railroad board also filed the statements of economic interest.

Mr. John F. McNair III

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Please feel free to furnish additional material for the Board to consider.

Sincerely,

Mildred M. Donavant  
Administrative Assistant

cc: Mr. Brad Wilson  
Board of Ethics

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JOHN F. McNAIR III

POST OFFICE BOX 3099

WINSTON-SALEM, NORTH CAROLINA 27150

July 26, 1993

Ms. Mildred M. Donavant  
Administrative Assistant  
North Carolina Board of Ethics  
116 West Jones Street  
Raleigh, North Carolina 27603-8003

Dear Ms. Donavant:

Thank you very much for your response to my letter regarding the appropriateness of the members of the Board of Directors of the North Carolina Railroad Company filing a Statement of Economic Interest with the North Carolina Board of Ethics.

In my opinion your letter makes a case for those individuals not being requested to file. You state in your third paragraph that Executive Order No. 1 is "to assure the public that officers of their government will not use their public position for personal gain." Obviously the Directors of North Carolina Railroad Company are not officers of state government and they are charged under accepted corporate law with making decisions that equally benefit all shareholders. Instead of being "officers of their government", they are directors of a publicly held corporation, which happens to have as one of almost one thousand shareholders, the State of North Carolina.

The filing of a document such as has been requested by the Board of Ethics would, at least to some, appear to require special allegiance to one shareholder (the State of North Carolina) as compared with the allegiance a director might have to all other shareholders.

You mention the fact that Executive Order No. 1 covers all gubernatorial appointees to commissions, boards and and councils where the Board of Ethics determines they are not solely advisory. In the instance of the Directors of the North Carolina Railroad Company, they are nominated by the Governor but they are not elected by the Governor and are in no sense of the word appointees.

The Board of Directors of the North Carolina Railroad Company does not allocate, spend, or invest public money in significant amounts, has no authority to grant or revoke licenses, cannot enter into a contract that involves significant amounts of public money. As a matter of fact, any contract of major proportions, such as the the one currently under negotiation, will have to be approved by a majority vote of all shareholders, including but not limited to the State.

Ms. Mildred M. Donavant  
July 26, 1993  
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The North Carolina Railroad Company does not receive state appropriations and the mere fact that "GS 124-4 indicates the Governor and Council of State reports to the General Assembly on the condition of all railroads in which the state has an interest" has no bearing, in my opinion, on the necessity of filing the aforementioned Statement of Economic Interest.

As was stated in my initial letter, the Directors of the North Carolina Railroad Company are governed by the myriad of laws that govern the behavior of corporate directors who are members of publicly held corporate boards. These laws are far reaching and far exceed the narrow scope of the Securities and Exchange Commission rules and regulations.

Please understand that it is not that I personally have any particular problem filing the Statement of Economic Interest, but I am sorely concerned that this sets up an appearance of conflict with the interests of the private shareholders in the North Carolina Railroad Company. Corporate directors have an equal interest to all shareholders and I think the Board of Ethics would be placing an undue burden on the ten directors who are nominated by the State of North Carolina but who are, once they take office, bound to follow the rules of good corporate governance which requires proper representation of all shareholders, not just the largest.

Possibly the misconception of the office of Director of the North Carolina Railroad Company is a result of the reading of the statute that might lead one to believe that Directors are gubernatorial appointees while in fact they are not.

Very truly yours,  
John F. McNair III

cc: J. Bradley Wilson, Esq.  
General Counsel  
Office of the Governor



**NORTH CAROLINA BOARD OF ETHICS**

116 WEST JONES STREET  
RALEIGH 27603-8003  
(919) 733-5103

GEORGE F. BASON  
CHAIRMAN

July 21, 1993

Mr. John F. McNair III  
234 Pine Valley Road  
Winston-Salem, North Carolina 27104

Dear Mr. McNair:

This is to acknowledge your letter received on July 20, 1993 regarding filing the Statement of Economic Interest.

The Board of Ethics will consider your letter and advise you of its decision. Meanwhile, I will explain the Board's position regarding the North Carolina Railroad Company and filing the statement of economic interest.

The purpose of Executive Order Number One is to assure the public that officers of their government will not use their public position for personal gain, and to create a process to prevent conflicts of interest in government and to deal with them when they do occur.

Therefore, it is important for the Board of Ethics to carefully consider coverage of commissions, boards, and councils so that the public has confidence in the process.

Executive Order Number One, Sections 3(g) and 6(a)(1) indicates that gubernatorial appointees to commissions, boards, and councils which the Board of Ethics determines are not solely advisory are covered by the Order and required to file statements of economic interest.

Section 4 of the Order indicates that the Board can exempt a commission, board, or council if it finds that the exemption does not violate the intent of the Order and does not interfere or conflict with the proper and effective discharge of the official duties of the members of the commission, board, or council. The determination of the Board is final according to Section 4.



Mr. John F. McNair III  
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Executive Order Number One does not indicate that the Board of Ethics should recognize any other form of regulation, such as by the Securities and Exchange Commission, to be grounds for exemption from the coverage of the Order.

The Board of Ethics covers commissions, boards, or councils if the body has the authority, power, or duty to do any of the following functions:

1. Allocate, spend, or invest public money in significant amounts.
2. Grant or revoke licenses.
3. Promulgate rules, regulations, or standards having the force of administrative law.
4. Enter into or approve contracts involving significant amounts of public money.
5. Set policy governing operation of an agency or institution.

The Board of Ethics determined in 1977 that the North Carolina Railroad Company was covered by Executive Order Number One. Requests for exemption from coverage have been considered since 1977, but the coverage still stands.

GS 147-12(7) indicates that the Governor appoints eight members to the board of directors of the North Carolina Railroad.

GS 124-1 indicates that the Governor and Council of State has charge of all the State's interest in all railroads, canals and other works of internal improvements.

GS 124-2 indicates that the State is deemed to be a shareholder in a corporation accepting appropriations.

GS 124-4 indicates that the Governor and Council of State reports to the General Assembly on the condition of all railroads in which the State has an interest.

GS 124-5 indicates that the NC Railroad Company cannot sell, lease, mortgage, or otherwise encumber its franchise, right-of-way, or other property without the approval of the Governor and Council of State.

Mr. John F. McNair III  
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GS 124-6 allows the Governor to appoint a Proxy to represent the State at the annual meeting of the stockholders of the NC Railroad Company.

Thus, it appears that the North Carolina Railroad Company does handle the public's business, and as such are subject to the coverage of Executive Order Number One which requires gubernatorial appointees to file statements of economic interest with the NC Board of Ethics.

Please feel free to furnish additional material for the Board of Ethics to consider while making its decision.

Sincerely,

Mildred M. Donavant  
Administrative Assistant

cc: Mr. J. Bradley Wilson  
General Counsel  
Office of the Governor  
  
Board of Ethics

JOHN F. M c N A I R III  
234 PINE VALLEY ROAD  
WINSTON-SALEM, NORTH CAROLINA 27104

July 16, 1993

Ms. Millie Donovan  
State Board of Ethics  
116 West Jones Street  
Raleigh, North Carolina 27603

Dear Ms. Donovan:

Re: Statement of Economic Interest

Earlier this week I received from your office the instructions and attached material regarding the Statement of Economic Interest which, under Executive Order No. 1, shall be filed by certain state employees and appointees.

This was sent in connection with my election by the shareholders to the Board of Directors of the North Carolina Railroad Company.

In reading through the material sent I have concluded that the Directorship of the North Carolina Railroad Company should not be classified as one of those positions which requires the filing of the aforesaid report.

Those who serve as Directors of the North Carolina Railroad Company are elected by the shareholders and are subject to the standards of general business directorships as well as the Securities and Exchange Commission. They receive no compensation, not even expense reimbursement, from the State of North Carolina and while nominated by the Governor of the State of North Carolina it is a real stretch to consider them in the same category as state board membership or state employees.

If the members of the Board of Directors of the North Carolina Railroad Company are required to file, it would seem to me to set up a potential conflict with their responsibility to all of the shareholders of the corporation. While the State of North Carolina is obviously the largest shareholder, there are additionally approximately 700 shareholders whose holdings must be considered in any decision made by the Board.

Ms. Millie Donovan  
July 16, 1993  
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In view of the far-reaching rules that govern the members of the board of directors of a publicly held company, the oversight of the Securities and Exchange Commission and the fact that members of this Board are not members of a state board or commission or a state employee, I request that these individuals be exempt from the reports required by Executive Order No. 1.

Very truly yours,

John F. McNair III

cc: Mr. J. Bradley Wilson  
General Counsel  
State of North Carolina  
Office of the Governor